



September 26, 2012

**EX PARTE**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Revision of the Commission's Program Access Rules, MB Docket No. 12-68; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, MB Docket No. 07-18; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, *et al.*, MB Docket No. 05-192.

Dear Ms. Dortch:

The Federal Communications Commission is considering whether to terminate a critical aspect of its long-standing program access rules that, since their inception, have ensured cable companies and affiliated cable programmers cannot deny their competitors access to content.<sup>1</sup> The rules require vertically integrated cable companies and cable-affiliated programmers to make such content available to other multichannel video programming distributors (MVPDs) by prohibiting exclusive arrangements in the absence of a showing that a specific arrangement would serve the public interest.

Congress adopted this requirement, and the Commission has twice extended it, to protect consumers and competitors from potential abuses by vertically integrated cable companies and cable-affiliated programmers, who otherwise control access to essential video content consumers expect. Without the exclusivity prohibition, unaffiliated MVPDs would lose critical program access safeguards, including presumptive rights to satellite-delivered regional sports networks (RSNs), which are essential in many local video markets. Meanwhile, the Commission's system for hearing and deciding complaints remains woefully inadequate, standing alone, to protect consumers and competitors without a continuation of this long-standing rule.

**I. Full Extension of the Rule is Needed.**

The Coalition for Competitive Access to Content (CA2C) supports a full extension of the restriction on exclusive arrangements for another five years. Despite some changes in the retail

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<sup>1</sup> See Notice of Proposed Rulemaking, FCC, *In the Matter of Revision of the Commission's Program Access Rules*, FCC 12-30, 77 Fed. Reg. 24302 (April 23, 2012) (*Notice*).

video market, the wholesale market for video content has not meaningfully changed since the Commission last renewed the rule.<sup>2</sup> If anything, vertically integrated cable companies and their affiliated programmers have greater incentive today to disadvantage competitors by withholding programming, thereby denying consumers a choice in provider for MVPD service. The inability of a competitive MVPD to timely secure access to reasonably priced content reduces choice for consumers, frustrates competition, and discourages investment in video and high-speed broadband networks. In accordance with the statutory language of the Act, the prohibition remains necessary in order to “preserve and protect competition and diversity in the distribution of video programming.”<sup>3</sup>

The CA2C nevertheless has heard that the Commission is considering adoption of an order allowing the rule to expire. If the Commission were to take that step, at the very least it must institute meaningful, robust alternative safeguards. Although such protections would be a poor substitute for this long-standing rule, the CA2C believes that the following safeguards, at a minimum, would need to be included in the order to protect consumers and preserve competition in the MVPD marketplace if the Commission is determined to allow this critical safeguard to sunset.

## **II. Preserving the Rule for Especially Critical Programming.**

At a minimum, the Commission should retain the prohibition on exclusivity for any cable-affiliated programming that carries the same amount of sports as an RSN that the Commission has identified in creating program access conditions for RSNs in its transaction reviews. The prohibition would apply regardless of whether the network is national or regional or otherwise considered a sports network.<sup>4</sup> There is substantial Commission precedent showing that such sports programming by its very nature is non-replicable and valuable to consumers, and

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<sup>2</sup> See e.g., Comments of the American Cable Association, pp. 2 – 10; Comments of AT&T, pp. 6 – 23; Comments of DIRECTV, pp. 6 – 26; Comments of OPASTCO and NTCA, pp. 3 – 6; Comments of Verizon, pp. 3 – 5; Comments of USTelecom, pp. 5 – 13. See also, Notice, ¶ 34 (noting that among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has increased from six to seven; the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by average prime time ratings has remained at seven; and the number of cable-affiliated RSNs has increased from 18 to 31 (not including HD versions)); Notice, Appendix B Table 1 and Appendix C Table 1.

<sup>3</sup> 47 U.S.C. §548(c)(5).

<sup>4</sup> Adelphia Order, ¶ 158; Comcast-NBCU Order, Appendix A, § 1 (defining a RSN as “any non-broadcast video programming service that (i) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (ii) in any year, carries a minimum of either 100 hours of programming that meets the criteria set forth in (i) above, or 10% of the regular season games of at least one sports team that meets the criteria set forth in (i) above”).

no realistic amount of investment can duplicate the unique attributes of such programming. Denial of access to such programming will significantly hinder competition and harm consumers.

In addition, the Commission should preserve the prohibition for the most popular cable-affiliated programming networks (such as the 20 with the highest ratings according to national ratings services), which remain critical to preserve and protect competition and diversity in the distribution of video programming. Notwithstanding the foregoing, vertically integrated cable operators and cable-affiliated programmers would retain the ability to file a “Petition for Exclusivity” to remove the prohibition upon a showing that a particular exclusive arrangement is in the public interest.

### **III. Absent a Full Extension of the Prohibition on Exclusivity, Minimum Safeguards Should be Adopted by the Commission.**

As detailed above, the CA2C maintains that the Commission would be justified in adopting a full extension of the restriction on exclusive arrangements for another five years. Absent that decision, however, it will be imperative for the Commission to institute robust and effective safeguards to ensure that it fulfills its statutory obligation to “preserve and protect competition and diversity in the distribution of video programming.”<sup>5</sup>

#### **A. Adopting Rebuttable Presumptions for Certain Programming.**

When it closed the terrestrial loophole in 2010, the Commission adopted a presumption that withholding RSN programming would harm rival MVPDs. With respect to cable-affiliated programming, the Commission should expand its rebuttable presumption to allow complainants to invoke a rebuttable presumption that withholding such programming is an “unfair act” that has the purpose or effect of hindering or preventing competition as described in Section 628(b).

The Commission must establish rebuttable evidentiary presumptions for complainants bringing cases under Section 628(b) not only for cases involving access to satellite or terrestrially-delivered RSNs, but also for complaints involving access to cable-affiliated national cable networks that air the same amount of sports programming as RSNs. This rebuttable presumption should also apply to popular, cable-affiliated programming networks (such as the 20 with the highest ratings according to national ratings services). Rather than forcing competitors and Commission staff to undertake repetitive and time-consuming examinations of historical evidence and precedents concerning withholding of such programming, the Commission should allow complainants to invoke rebuttable presumptions that the withholding of such a cable-affiliated programming network is both an “unfair act” and that it has the purpose or effect of hindering or preventing competition as described in Section 628(b).<sup>6</sup>

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<sup>5</sup> 47 U.S.C. § 548(c)(5).

<sup>6</sup> Because of the continued importance of high definition (HD) programming in the marketplace and its distinctive characteristics, the Commission should continue to analyze the HD version of

The Commission should also make clear that these presumptions apply to any exclusive content arrangements by a cable company or its cable-affiliated programmer, including exclusive content arrangements with other cable companies (such as a “cable only” exclusive). If there is any issue with regard to the cable affiliation of any programmer subject to a complaint, the burden of establishing lack of ownership or control should rest with the defendants as they have control over the relevant information.<sup>7</sup> The Commission’s proposed rule changes along these lines in the Notice include a mechanism retaining the ability of vertically integrated cable operators and cable-affiliated programmers to file a “Petition for Exclusivity” that would enable vertically integrated cable operators and cable-affiliated programmers to preclude the filing of complaints in appropriate cases.<sup>8</sup>

**B. Adopting Rebuttable Presumptions Based on Previous Successful Complaints.**

In the event that the Commission permits the exclusivity prohibition to sunset in its entirety, it must also establish rebuttable presumptions that an exclusive contract involving a cable-affiliated programming network that was the subject of a successful complaint filed under Section 628(b) (or, potentially, the Section 628(b)(2)(B) prohibition on discrimination), is both unfair and has the purpose or effect of significantly hindering any other MVPD’s ability to provide such cable-affiliated programming. Such an approach would economize the Commission’s limited resources, by foreclosing the need for Commission staff to undertake repetitive examinations of program access complaints.

**C. Adopting Rebuttable Presumption Supporting Standstill Relief.**

Under the Commission’s rules, an MVPD seeking renewal of an existing programming contract may obtain a temporary standstill of the price, terms, and other conditions of such a contract through the program access complaint process upon a showing that the complainant is

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a network separately from the standard definition (SD) version with similar content for purposes of its statutory analysis. Thus, the fact that a defendant offers the SD version of a network to subscribers will not alone be sufficient to refute the complainant’s showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b).

<sup>7</sup> The Commission must make explicit in its Order that the ban on discrimination in Section 628(c)(2)(B) prevents cable-affiliated programmers from selectively refusing to deal. The Commission has already noted in the NPRM that selective refusals to license programming by a cable-affiliated, satellite-delivered programmer violates the prohibition against discrimination among MVPDs, absent a legitimate business reason. *Notice*, ¶ 64. The Commission must affirm in its Order that, if a cable-affiliated programmer provides rights to serve a location with its programming to more than one MVPD, the discrimination prohibition prohibits the programmer from refusing to provide rights to serve the same location to any other MVPD.

<sup>8</sup> *Notice*, p. 79.

likely to prevail on the merits of its complaint, the complainant will suffer irreparable harm, that grant of a stay will not substantially harm other interested parties, and the public interest favors grant of a stay. In cases involving any of the rebuttable presumptions discussed above, the Commission should also adopt a rebuttable presumption that the complainant is likely to prevail on the merits and will suffer irreparable harm for purposes of a petition for temporary standstill under Section 76.1003(l) of the Commission's rules.

Such an approach has several benefits, including minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations); encouraging settlement; and increasing the usefulness of the program access complaint process. And in the case of programming of the type that it is subject to a rebuttable presumption of "significant hindrance" – including regional sports programming – the Commission should expeditiously grant a standstill as a matter of course unless the cable incumbent presents strong evidence that a particular exclusive arrangement would be in the public interest.

**D. Adopting a Shot-Clock and Interim Carriage for New Entrants Seeking Programming Contracts.**

The Commission should adopt specific procedures whereby an MVPD seeking access to vertically integrated programming under a new contract may request interim carriage of the programming subject to retroactive application of established prices, terms and conditions during the pendency of the complaint. The complaint process should be subject to a strict 'shot-clock' (not to exceed 60 days) to ensure expeditious resolution of the underlying complaint. In the absence of a Commission or Bureau decision within 60 days of the filing of a 628(b) complaint involving cable controlled or affiliated programming, the complaint should be subject to an automatic grant process that provides access to the subject programming. Furthermore, a complainant should be afforded the opportunity to extend the shot clock in instances where additional time is needed.

**IV. Conclusion.**

The long-standing exclusivity prohibition has been critical to protecting consumers' interest in competition and diversity in programming choices, to protecting MVPD competition, and to promoting investment in competing video and broadband networks. There is no basis in the record for allowing these protections to expire. If the Commission is nonetheless to follow that course, however, its order should at the very least adopt the pro-competitive safeguards as outlined by the CA2C.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin G. Rupy", with a stylized flourish at the end.

Kevin G. Rupy  
Senior Director, Policy Development

cc: Zachary Katz  
Lyle Elder  
Erin McGrath  
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